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U.S. Department of Justice
Office of the Solicitor General

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November 18, 2011

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Toby Douglas, Director, California Department of Health Care Services v. Independent Living Center of Southern California, Inc., et al., S. Ct. No. 09-958

Toby Douglas, Director, California Department of Health Care Services v. California Pharmacists Association, et al., S. Ct. No. 09-1158

Toby Douglas, Director, California Department of Health Care Services v. Santa Rosa Memorial Hospital, et al., S. Ct. No. 10-283 (Argued Oct. 3, 2011)

Dear Mr. Suter:

On November 4, 2011, the Court directed the parties and the Solicitor General to address the following question: "What should be the effect, if any, of the developments discussed in the letter submitted by the Solicitor General on October 28, 2011, on the proper disposition of this case?" For the reasons set forth below, it is the view of the United States that while those developments alter the context in which the cause-of-action issue arises in these consolidated cases in a significant way, it remains appropriate for the Court to resolve that issue.

1. As discussed in the October 28, 2011, letter, the Centers for Medicare & Medicaid Services (CMS) recently approved several modified State Plan Amendments (SPAs) submitted by California that cover Medicaid provider rate reductions enacted by the California Legislature in Assembly Bill 5 (AB 5) and Assembly Bill 1183 (AB 1183), including certain rate reductions that are currently subject to preliminary injunctions entered in the consolidated cases under review in *Douglas*. California also withdrew its formal request for reconsideration of the remaining disapproved SPAs at issue in the *Douglas* cases. As a result, for the time period prior to January 1, 2011, California is no longer seeking CMS approval for any of the rate reductions for the period during which they had been preliminarily enjoined by a court order entered in the consolidated *Douglas* cases. And, for the period of time beginning on or after January 1, 2011, CMS has now approved many of the enjoined rate reductions for retroactive implementation (including recoupment of amounts overpaid). See 10/28/11 Letter & Chart (detailing recent developments).

2. "[A] federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v.

Green, 159 U.S. 651, 653 (1895)). The parties must at all times have "a 'personal stake in the outcome' of the lawsuit." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (quoting *City of L.A.* v. *Lyons*, 461 U.S. 95, 101 (1983)). And if an intervening event occurs that "makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party," the case must be dismissed. *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653). The recent developments detailed in the Solicitor General's October 28, 2011, letter do not moot the consolidated cases in *Douglas*. Most, if not all, of those cases continue to present a live controversy.

The consolidated certiorari petitions encompass five lawsuits that produced several district court and court of appeals opinions—all of which ultimately resulted in a court order preliminarily enjoining the challenged rate reductions as inconsistent with 42 U.S.C. 1396a(a)(30)(A).

a. In two of the three cases encompassed in No. 09-1158 (*Cal. Pharm.*), the lower courts preliminarily enjoined the one-percent rate reduction for hospital outpatient services; the five-percent reduction for prescription drugs, distinct part skilled nursing facilities, distinct part adult and pediatric subacute facilities, and adult day health centers; and the rate cap on non-contracting hospitals—all imposed by AB 1183. See U.S. Merits Stage Amicus Br. 6-7; 10/28/11 Chart. In No. 10-283 (*Santa Rosa*), the lower court preliminarily enjoined the ten-percent rate reduction and cap on non-contracting hospitals imposed by AB 5. See U.S. Merits Stage Amicus Br. 8; 10/28/11 Chart.

All of the rate reductions so enjoined were encompassed in the SPAs recently approved by CMS. For the time period before 2011, the SPAs only covered (and CMS only approved) those rate reductions for the time period during which no preliminary injunction was in effect. But the SPAs also covered (and CMS also approved) many of those rate reductions for time periods beginning on or after January 1, 2011, regardless of whether an injunction was then in effect.[1] Thus, CMS has authorized California to retroactively implement those 2011 reductions for a certain number of months and to recoup amounts overpaid during that time period. See generally 10/28/11 Letter & Chart.

Based on CMS's recent approvals, California is authorized to retroactively implement those rate reductions. But the preliminary injunctions preclude California from doing so. Nothing in the language of the injunctions rests on the absence of CMS approval and, unless set aside, California must continue to comply despite CMS's subsequent approval of the rate reductions. See, *e.g.*, *California Pharmacists Ass'n* v. *Maxwell-Jolly*, No. 09-55365 (9th Cir. Mar. 3, 2010) (remanding to the district court to enjoin AB 1183's rate reductions for certain hospital services); *California Pharmacists Ass'n* v. *Maxwell-Jolly*, No. 09-722 (C.D. Cal. June 16, 2010) (on remand, ordering "Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code 14105.191 and 14166.245 with respect to services provided under the fee-for-service Medi-Cal program, by refraining from reducing by five

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[1] The 2008 SPAs did not cover (and CMS did not approve) 2011 reductions for distinct part adult and pediatric subacute facilities. See 10/28/11 Chart.

percent payments to hospitals for distinct part nursing facility services and subacute services, by refraining from reducing by one percent payments to hospitals for outpatient services"); *California Pharmacists Ass'n* v. *Jolly*, 630 F. Supp. 2d 1144, 1154 (C.D. Cal. 2009) (ordering the "Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code § 14105.191, as modified by AB 1183 beginning on March 9, 2009, by refraining from reducing by five percent payments to [adult day health centers] provided under the Medi-Cal fee-for-service program"); *Managed Pharmacy Care* v. *Maxwell Jolly*, No. 09-382 (C.D. Cal. Feb. 27, 2009), slip. op. 17-18 (ordering "Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code § 14105.191(b)(3), as modified by AB 1183 beginning on March 1, 2009, by refraining from reducing five percent payments to pharmacies for prescription drugs (including prescription drugs and traditional over-the-counter drugs provided by prescription) provided under the Medi-Cal fee-for-service program"). Cf. 10/3/11 Oral Argument Tr. 42 (Oral Argument Tr.) (noting that the district court "granted a broader preliminary injunction" and did not consider an "alternative argument" that would have provided that the injunction "should stay into effect at least until [the Department of Health and Human Services (HHS)] acts"). If the judgments of the court of appeals were reversed, and the injunctions vacated, California would then be free to retroactively implement the rate reductions in part and recoup amounts overpaid. In the meantime, California remains enjoined from implementing its (now approved) rate reductions. Because the subsisting preliminary injunctions in *Douglas* "continue[] to have an impact on the parties" that can be redressed by this Court, "the case remains alive." *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 569 (1984); *ibid.* (rejecting mootness argument and reasoning that "[i]t would appear from its terms that the injunction is still in force and that unless set aside must be complied with").

b. In No. 09-958 (*Indep. Living*), the lower courts preliminarily enjoined the ten-percent rate reduction imposed by AB 5 for physicians, clinics, dentists, optometrists, adult day health centers, prescription drugs, non-emergency medical transportation, and home health services. U.S. Merits Stage Amicus Br. 4-5; 10/28/11 Chart. California subsequently withdrew its request for approval of the rate reductions associated with some of those services (physicians, clinics, dentists, optometrists, adult day health centers, and prescription drugs). 10/28/11 Chart. Accordingly, the preliminary injunctions have no continuing impact on California with respect to those rate reductions. See *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam) ("'[T]he question whether a preliminary injunction should have been issued here is moot, because the terms of the injunction . . . have been fully and irrevocably carried out.' * * * No order of this Court could affect the parties' rights with respect to the injunction we are called upon to review.") (quoting *University of Tex.* v. *Camenisch*, 451 U.S. 390, 398 (1981)). CMS did, however, approve the ten-percent rate reductions for non-emergency medical transportation and home health services, though only for the period of time *before* the district court issued its preliminary injunction. See 10/28/11 Chart. While that too would suggest that the preliminary injunction has no continuing impact on California, a request for a permanent injunction that appears to encompass retrospective relief remains pending and has been stayed pending this Court's decision. See Mot. for Summ. J. at 3-4, *Independent Living Ctr. of S. Cal., Inc.* v. *Maxwell-Jolly*, No. 08-03315 (C.D. Cal. June 7, 2010); Minute Order, *Independent Living Ctr. of S. Cal., Inc.*, *supra* (June 17, 2010) (No. 08-03315).

Accordingly, portions of No. 09-958 appear to remain live as well.

c. The recent developments set forth in the October 28, 2011, letter had no impact on the other case encompassed in No. 09-1158: *Dominguez* v. *Schwarzenegger*, No. 09-2306 (N.D. Cal.). As the government explained in its amicus brief (U.S. Merits Stage Amicus Br. 4), Senate Bill 6 (SB 6), which was preliminarily enjoined in *Dominguez*, reduced a cap on the State's maximum contribution to wages and benefits paid to employees by counties for In-Home Supportive Services. None of the SPAs submitted by California encompassed that reduced cap and, accordingly, the recent SPA approvals have no impact on that case. See 10/28/11 Letter at 1 n.*.

That said, after the district court issued its preliminary injunction, the California Legislature amended SB 6 to delay implementation until July 2012 and until a court first validates the reduced cap. See U.S. Merits Stage Amicus Br. 4; Cal. Welf. & Inst. Code § 12306.1(d)(6)-(7) (West Supp. 2011). Thus, while CMS's recent approvals do not affect the *Dominguez* case, the statutory amendment to SB 6, which requires court approval before the reduced cap could become effective, could raise questions regarding whether a continuing controversy exists that would provide a basis for ongoing enforcement of the preliminary injunction in that case.

3. The question presented in these consolidated cases is whether Medicaid providers and beneficiaries may maintain a private right of action under the Supremacy Clause to assert that 42 U.S.C. 1396a(a)(30)(A) preempts state law reducing reimbursement rates. The recent developments set forth in the October 28, 2011, letter do alter the circumstances in which that issue arises, but it remains appropriate for the Court to resolve that issue.

It was suggested at oral argument that Medicaid providers and beneficiaries might have a limited right of action to sue state officials to enjoin the operation of state law that imposes rate reductions allegedly in violation of Section 1396a(a)(30)(A) *before* CMS approves the relevant rate reductions, even if they do not have a right of action to sue state officials to enjoin the operation of state law *after* CMS has concluded that the rate reductions comply with Section 1396a(a)(30)(A). See, *e.g.*, Oral Argument Tr. 12-13, 41, 59. On that theory, the consolidated cases would now stand in a very different posture as a result of the recent SPA approvals by CMS because respondents would no longer have any right of action (apart from whatever action they may have under the Administrative Procedure Act (APA)) to challenge the approved rates. Of course, petitioner's arguments (and those of the United States) would not recognize a cause of action to challenge state rate reductions before or after CMS approval.

And respondents' position is not entirely clear. On the one hand, the legal theory respondents advanced in this Court would not appear to provide a doctrinal basis for making this distinction, and respondents maintained at oral argument that they would have a cause of action under the Supremacy Clause even "if the agency approves the rates." See Oral Argument Tr. 54; *id.* at 53 ("[T]o be sure, I have a cause of action."); *id.* at 55 ("I still think you can bring an action under the Supremacy Clause."). As respondents explained, "it's the State acting pursuant to what the agency has approved, that if you still thought it violated Federal law, [that] would be a basis for seeking a

Supremacy Clause action." *Id.* at 57.[2] On the other hand, respondents also indicated that they would be "perfectly comfortable" with a ruling limiting potential injunctive relief to circumstances in which CMS had not yet approved rates, that they had advanced such an "alternative argument" in the district court, and that the "obvious solution" would be to challenge approved rates under the APA rather than in an action under the Supremacy Clause. Oral Argument Tr. 41, 42, 57.

Although the changed circumstances could be a basis for considering whether the writ of certiorari should be dismissed as improvidently granted, given that the posture of the case is now significantly different than it was when certiorari was granted, one difficulty with that approach is that CMS's approval of the rate reductions at issue in this case permits retroactive implementation of the enjoined reductions for some period of time on or after January 1, 2011, and the preliminary injunctions do not expire on their own terms upon CMS approval of the challenged rates. Unless the preliminary injunctions are vacated, the State is precluded from retroactively implementing approved rate reductions and recouping amounts overpaid during the interim period.[3] Thus, if the Court considers dismissing the writ, then the courts below would still need to vacate the injunctions. Alternatively, to the extent the Court believes that the absence of CMS approval may be an important consideration in determining the availability of any right of action for injunctive relief, it could consider vacating the decisions below and remanding with instructions to vacate the preliminary injunctions.

4. To be sure, CMS's approval affects the merits of respondents' preemption claims. Respondents argued below, and the court of appeals held, that the challenged rate reductions conflict with Section 1396a(a)(30)(A). CMS, which administers the federal Medicaid program on behalf of the Secretary of HHS, has now determined that many of those same rate reductions (as modified)

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[2] Respondents' subsequent actions confirm that approach. On October 27, 2011, CMS approved several 2011 SPAs encompassing ten-percent rate reductions provided for under laws passed by the California Legislature in 2011 that were not before the lower courts in the *Douglas* cases. See 10/28/11 Letter at 3. Immediately thereafter, several of the respondents filed suits for injunctive relief against both state and federal officials. The complaints assert, among other things, a cause of action under the Supremacy Clause to enforce Section 1396a(a)(30)(A), as well as an APA claim against the Secretary. See Compl. ¶¶ 83-84, 91-93, *California Hosp. Ass'n* v. *Douglas*, No. 11-9078 (C.D. Cal. Nov. 1, 2011); Compl. ¶¶ 32, 35, *Managed Pharmacy Care* v. *Sebelius*, No. 11-9211 (C.D. Cal. Nov. 4, 2011).

[3] Moreover, the question whether providers and beneficiaries have any right of action to sue state officials to enjoin the operation of state law during the administrative review process is a recurring issue—and one that may evade fulsome appellate review if CMS's ultimate approval of a SPA somehow eliminated a private right of action. See *Burlington N. R.R. Co.* v. *Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 436 n.4 (1987) ("Because these same parties are reasonably likely to find themselves again in dispute over the issues raised in this petition, and because such disputes typically are resolved quickly by executive or legislative action, this controversy is one that is capable of repetition yet evading review.").

comply with Section 1396a(a)(30)(A). See Approval Letter for SPA Nos. 08-009A, 08-009B1, 08-009D & Approval Letter for SPA No. 10-24 (attachments to 10/28/11 Letter). CMS's legal determination is entitled to deference, see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005), and CMS's assessment that approval is warranted on the basis of the State's new submissions would be subject to judicial review under the APA (if at all), only under the arbitrary and capricious standard. See 5 U.S.C. 706(2)(A). Indeed, respondents appeared to agree that, once CMS approved the rate reductions, they would have "zero hope of prevailing." See Oral Argument Tr. 55.

But that does not render the cases moot.[4] Nor does it suggest that the Court should vacate the judgment below and remand for reconsideration of the merits of respondents' preemption claims. First, CMS determined that the rate reductions complied with Section 1396a(a)(30)(A) based on a substantive standard that is materially different than the one applied by the Ninth Circuit and advocated by respondents. The Ninth Circuit has consistently construed Section 1396a(a)(30)(A) to require a State to set reimbursement rates that "bear a reasonable relationship" to provider costs and to consider "responsible cost studies" *before* establishing such rates, as well as to bar rate reductions solely for budgetary reasons. See, *e.g.*, *Orthopaedic Hosp.* v. *Belshe*, 103 F.3d 1491, 1496, 1499 n.3 (1997), cert. denied, 522 U.S. 1044 (1998); *Independent Living Ctr. of S. Cal., Inc.* v. *Maxwell-Jolly*, 572 F.3d 644, 652-657 (2009), cert. granted in part, No. 09-958 (argued Oct. 3, 2011); *California Pharmacists Ass'n* v. *Maxwell-Jolly*, 596 F.3d 1098, 1106, 1115 (2010), cert. granted in part, No. 09-1158 (argued Oct. 3, 2011). The government's amicus brief at the petition stage in *Orthopaedic Hospital* made clear that the Secretary of HHS disagreed with the Ninth Circuit's cost-based construction of Section 1396a(a)(30)(A). See U.S. Br. at 7-9, *Belshe* v. *Orthopaedic Hosp.*, 522 U.S. 1044 (1998) (No. 96-1742). Yet, the Ninth Circuit declined to defer to the federal agency responsible for administering the Medicaid Act. See *Independent Living Ctr. of S. Cal., Inc.*, 572 F.3d at 654 ("Whatever the merits of the Solicitor General's views, we owe them no deference in this case."). But cf. *Alaska Dep't of Health & Social Servs.* v. *CMS*, 424 F.3d 931, 938-942 (9th Cir. 2005) (deferring to CMS's disapproval of SPA based on noncompliance with Section 1396a(a)(30)(A)). And some of the respondents continue to argue that the Ninth Circuit's standard controls. See Compl. ¶ 62(a), *California Hosp. Ass'n*, No. 11-9078 (C.D. Cal. Nov. 1, 2011) (alleging that "[b]ecause California is within the jurisdiction of the Ninth Circuit Court of

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[4] *Lewis*, *supra*, is not to the contrary. In *Lewis*, the Court held that a Commerce Clause claim was rendered moot when Congress amended the Bank Holding Company Act of 1956, 12 U.S.C. 1841 *et seq.*, to permit States to prohibit an out-of-state bank holding company from owning the type of in-state "bank" at issue in that case. 494 U.S. at 474. The intervening event was a congressional enactment that, all parties conceded, validated the State's challenged action. Here, the intervening event is an agency approval that, while entitled to deference (see p. 6, *supra*), does not indisputably resolve the underlying preemption claims. Moreover, the Court in *Lewis* granted certiorari to decide the Commerce Clause issue; here, the Court granted certiorari to decide whether a cause of action exists—and *that* question remains even after CMS's approval of certain rate reductions at issue. Accordingly, unlike in *Lewis*, the parties still have a "personal stake," 494 U.S. at 478 (quoting *Lyons*, 461 U.S. at 101), in the outcome of these cases.

Appeals, the Secretary is bound to apply the Ninth Circuit's interpretation of the Medicaid Act, including Section 30(A), when evaluating California SPAs for compliance with the Medicaid Act"); Mot. for Prelim. Inj. at 5-7, *Managed Pharmacy Care*, No. 11-9211 (C.D. Cal. Nov. 4, 2011) (explaining difference between Secretary's interpretation of Section 1396a(a)(30)(A) and that of the Ninth Circuit).

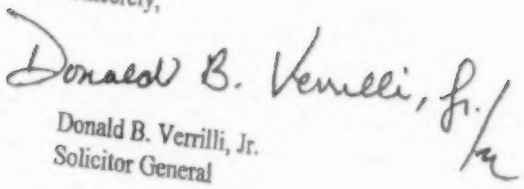
Second, this Court granted review limited to the threshold question whether the Supremacy Clause provides a cause of action to Medicaid providers and beneficiaries who assert that state law conflicts with the requirements of Section 1396a(a)(30)(A)—*not* whether the court of appeals erred in concluding that such a conflict actually existed. The Court expressly declined to grant review on the State's substantive obligations under Section 1396a(a)(30)(A). Even if intervening events alter the underlying merits of respondents' claims, this Court can answer the question on which it granted certiorari. Cf. *Wilkie* v. *Robbins*, 551 U.S. 537, 567 (2007) ("Because neither *Bivens* nor RICO gives Robbins a cause of action, there is no reason to enquire further into the merits of his claim."); *California* v. *Sierra Club*, 451 U.S. 287, 298 (1981) ("Our ruling that there is no private cause of action permitting respondents to commence this action disposes of the cases: we cannot consider the merits of a claim which Congress has not authorized respondents to raise.").

Third, the government explained in its amicus brief at the petition stage that the Secretary had then recently disapproved the SPAs at issue and that the State had initiated a formal hearing process. U.S. Pet. Stage Amicus Br. 20. The government recommended against review because, among other reasons, the cases involved preliminary injunctions and were in an interlocutory posture that would allow the courts below to consider developments in the ongoing administrative hearing process. *Id.* at 21. The Court nonetheless granted certiorari to answer the cause-of-action question. Given that the Court has granted certiorari, and the parties have now briefed the case and presented oral argument, the circumstances bearing on whether the Court should resolve the cause-of-action issue are different than when the government previously recommended against review. Cf. *Pacific Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 447 (2009) (noting "prudential concerns" such as the fact that "the parties have invested a substantial amount of time, effort, and resources in briefing and arguing the merits of this case").

5. One final point is worth noting. CMS's retroactive approval of the SPAs confirms what the regulations make clear: a State can implement amendments to its State plan prior to CMS approval. A SPA that is approved can "become effective" as early as the first day of the calendar quarter in which the amendment is submitted. 42 C.F.R. 447.256(c); see 42 C.F.R. 430.20(b)(2). That is precisely what happened here. For example, California submitted several SPAs on September 30, 2008; upon approval, the earliest reductions became effective July 1, 2008. See Approval Letter for SPA Nos. 08-009A, 08-009B1, 08-009D (attachment to 10/28/11 Letter). To be sure, a State that chooses to implement amendments prior to approval does so at the risk that CMS will later disapprove those amendments. But the Medicaid regulations clearly contemplate and authorize retroactive approval of SPAs.

I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,



Donald B. Verrilli, Jr.
Solicitor General

cc: Counsel of Record